UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. A.M.,	)	
Petitioner,	)	
v.	)	**No. 98 C 5625**
JERRY BUTLER, Superintendent of the Illinois Youth Center, and the ATTORNEY GENERAL OF THE STATE OF ILLINOIS,	)	
Respondents.	)	

ORDER

The parties to this case have delayed filing post-hearing memoranda pending the court's ruling on three evidentiary disputes: (1) the admission of the affidavit of Richard Ofshe, Ph.D.; (2) admission of testimony relating to the Ryan Harris case; and (3) Petitioner's request that the court take judicial notice of newspaper articles relating to Robert Sandifer.

Affidavit of Richard Ofshe, Ph.D.

Respondent argues that Dr. Ofshe's testimony is inadmissible under the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), which remains the standard for introduction of expert testimony in Illinois courts. Petitioner has not established that "Dr. Ofshe's theory on police interrogation is sufficiently established so as to be described as 'generally accepted.' " (Respondents' Objections to Expert Testimony, at 3-4.) Respondent concedes that Dr. Ofshe has been permitted to testify in this circuit. *See United States v. Hall*, 93 F.3d 1337 (7th Cir. 1996) (trial court erred in refusing to conduct *Daubert* inquiry

concerning Ofshe's testimony); *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997) (on remand, court expressed reservations about admission of social science testimony under *Daubert* standards but concluded Dr. Ofshe's testimony is admissible, with certain limitations).[1] Respondent argues, however, that the federal standard for admission of such testimony, set forth in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), is a more liberal one. Because review of a state court conviction in a federal *habeas* proceeding is not a federal trial, Respondent argues, this court should rely on *Frye*, the standard that would have been applicable had the Illinois court conducted a separate suppression hearing in this case.[2]

Neither party has identified case law that specifically addresses the issue of whether state law or federal law governs the admissibility of expert testimony in a federal habeas proceeding. Rule 1101 of the Federal Rules of Evidence states that those rules apply in habeas proceedings "to the extent that matters of evidence are not provided for in the statutes which

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[1] In fact, although Respondent asserts that Illinois prosecutors have objected successfully to Dr. Ofshe's testimony (Respondent's objections, at 3 n. 1), the court notes at least a handful of reported decisions in state courts in which his testimony was admitted, often without discussion of the standards for admission. *See Arnett v. Lewis* 870 F. Supp. 1514, 1532 (D. Ariz. 1994); *New Jersey v. Chippero*, 164 N.J. 342, 753 A.2d 701 (2000); *Callis v. State of Indiana*, 684 N.E.2d 233 (Ind. App. 1997); *Washington v. Miller*, 1997 WL 328740, *7 (Wash. App. Div. 3 1997); *Florida v. Sawyer*, 561 So.2d 278 (Fla. App. 2nd Dist. 1990); *but see California v. Son*, 79 Cal. App. 4th 224, 93 Cal. Rptr. 2d 871 (Cal. App. 4th Dist. 2000) (declining to admit Dr. Ofshe's testimony).

[2] Respondent's argument assumes that *Daubert* provides more generous standards for admission of expert testimony. *But see United States v. Dronas*, 218 F.3d 496, 503 (5th Cir. 2000) (spectrographic evidence admissible under *Frye* standard would not be admitted under *Daubert* standard). For purposes of this discussion, the court will assume that Respondent's assessment of the comparative stricture of the state and federal standards is accurate.

govern procedure therein." Petitioner cites several cases in which, consistent with this direction, federal courts have made reference to the federal evidence rules in habeas hearings. *See Lowery v. State of Maryland*, 401 F. Supp. 604, 606 (D. Md. 1975) (invoking Rule 804(b)(3) in refusing to admit affidavit of key witness recanting his state court testimony); *United States ex rel. Collins v. Welborn*, 1999 WL 1102700, *9 n.5 (N.D. Ill. Nov. 24, 1999). At least one court has, however, specifically declined to apply state court evidence rules in a federal habeas evidentiary hearing:

> McDowell [Respondent] first argues that the district court erred by applying Federal Rule of Evidence 606(b) to decide the admissibility of Kimble's declaration. McDowell contends the district court should have applied California Evidence Code Section 1150(a). We disagree. Federal Rule of Evidence 1101(e) provides that the Federal Rules of Evidence apply to habeas corpus petitions filed in federal court under 28 U.S.C. § 2254. Fed.R.Evid. 1101(e). Other Circuits have applied Rule 606(b), rather than state law, when determining whether evidence is admissible to impeach a state court verdict. *Bibbins v. Dalsheim*, 21 F.3d 13, 16-17 (2d Cir.1994); *Stockton v. Commonwealth of Va.*, 852 F.2d 740, 743-44 (4th Cir.1988); *Silagy v. Peters*, 905 F.2d 986, 1008-09 (7th Cir.1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991); *see also Bloom v. Vasquez*, 840 F.Supp. 1362, 1377 (C.D.Cal.1993).

McDowell v. Calderon, 107 F.3d 1351, 1367 (9th Cir. 1997).

The case before this court involves a standard established by Supreme Court case law rather than by a Federal Rule of Evidence. Nevertheless, the court finds no reason to depart from the rationale set forth in *McDowell*. The purpose of the hearing before this court is not, as Respondent here suggests, to replicate what might have happened had the state court conducted a hearing on the voluntariness of A.M.'s confession. The issue here is whether A.M.'s constitutional rights were violated, and specifically whether his confession was

involuntary and sufficiently reliable. Dr. Ofshe would provide expert testimony concerning that specific issue. In *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997), Judge McDade concluded that Dr. Ofshe's method for the study of false confessions "is a method generally accepted as reliable by the community of social psychologists" and that his techniques are "wholly acceptable" in his field. 974 F. Supp. at 1203, 1205. Notably, although Respondent argues that the *Frye* standard should apply here, Respondent himself does not argue that Dr. Ofshe's testimony is inadequate under the standards set forth in *Daubert*.

Respondent's objection to admission of Dr. Ofshe's affidavit is overruled.

Testimony relating to Ryan Harris

The court sustained Respondent's relevance objections to testimony concerning the Ryan Harris case, in which Detective Cassidy obtained confessions from juveniles in circumstances arguably similar to those presented in this case. Petitioner has submitted a written offer of proof concerning Detective Cassidy's testimony regarding the Ryan Harris case. Respondent stands on his objection to Detective Cassidy's testimony and moves to strike evidence concerning the Ryan Harris matter that now appears in the record.

Rule 404(b) prohibits admission of evidence of "other . . . acts . . . to prove the character of a person in order to show action in conformity therewith." Petitioner argues that evidence concerning Ryan Harris is admissible because it establishes Detective Cassidy's "distinct method of operation" or "common scheme or pattern" for obtaining confessions from juveniles. Having again considered the testimony offered during the hearing, as well as Petitioner's offer of proof, the court stands by its earlier ruling and sustains Respondent's

objection, with a limited exception, noted below.

Petitioner has argued that the evidence shows numerous similarities between the events surrounding A.M.'s confession and those surrounding the confessions of juveniles in the Ryan Harris matter. Notably, however, the interview of juveniles in the Ryan Harris matter took place almost four years after the interview of Petitioner at issue here, and there is no evidence (a) of other interrogations of juveniles or (b) of ways in which the interrogations of juveniles differed from Detective Cassidy's practices for interrogating adult suspects. Moreover, many of the proffered similarities are circumstances that would be common to any police interrogation of a witness or suspect, and/or do not reflect a "distinct method" of operation.

First, with respect to the assertion that Detective Cassidy separated the minors from their parents, Respondent notes that no one prohibited Petitioner's mother from accompanying him to the police station, and that one of the minors interviewed in the Ryan Harris case was in fact accompanied by his grandmother. Detective Cassidy provided a plausible explanation for his desire to interview the second of the two minors in that case alone; he explained that if the minor child had disobeyed his mother, he might be disinclined to admit this in her presence. (Evidentiary Hearing Transcript at 343.) In other words, "[t]he reasoning behind . . . interviewing the child without the mother is because there was some concern that the parent might interfere with the truth finding process." (*Id.*) Conducting an interview in a fashion designed to find the truth is not inconsistent with standard police procedure, nor does it reflect a "pattern" unique to juvenile interrogations.

Second, Petitioner argues that Detective Cassidy employed a "common scheme" when he delayed summoning a "youth officer" until Petitioner had made an incriminating statement. No youth officer was called for Petitioner or for the minors questioned concerning Ryan Harris until each had made an incriminating statement. Respondent asserts that the purpose for securing the presence of a youth officer "is to protect the rights of a minor while being questioned by police." (Respondent's Memorandum in Support of Motion to Strike, at 4-5.) If this is indeed the purpose, the court does not find satisfying Respondent's suggestion that the minors had no need of protection until after their status had changed "from witness to suspect." (*Id*. at 5.) The court nevertheless sees no "common scheme or pattern" arising from two instances separated by four years.

The third proffered similarity between the interrogation of Petitioner and the interrogation of the minors in the Ryan Harris matter is the fact that Detective Cassidy confronted the minors with inconsistencies in their statements. Respondent correctly notes that common sense suggests such a tactic would be common to police interrogation. Indeed, in any interview, the questioner is likely to ask probing questions about apparent inconsistencies. The court concludes this factor does not reflect a "common scheme or pattern." Nor does any "pattern" emerge from the seventh factor Petitioner has identified: similarity between the interrogation of Petitioner and the interrogation of the minors in the Ryan Harris matter the fact that Detective Cassidy read what the parties refer to as "kiddie rights" to one of the minors involved in the Ryan Harris investigation, but not to Petitioner in this case.

As the fourth, fifth, and sixth of his proferred seven factors, Petitioner notes with suspicion the fact that according to Detective Cassidy, all three minors gave narrative incriminating statements and that Detective Cassidy accepted them as true, despite what Petitioner believes is an absence of corroboration, and relied on them as the sole basis for the charges. The court believes this evidence is admissible, but not for the purpose for which Petitioner has offered it. The court agrees with Respondent that the manner in which a statement is given is not a factor within Detective Cassidy's control, and therefore cannot contribute toward a "pattern" of Detective Cassidy's conduct. (Respondent's Memorandum at 6.) Detective Cassidy's testimony that A.M. gave a spontaneous narrative statement is subject to impeachment, however. The fact that Detective Cassidy claims that juveniles in other interrogations gave narrative incriminating statements may fairly be used to impeach the credibility of his testimony concerning A.M.'s confession in this case. Petitioner is entitled to argue that it is unlikely that similar inculpatory statements were given by juveniles under similar circumstances. The weight of this evidence may be slight, but the court concludes it is admissible.

Respondent's motion to strike all testimony regarding Ryan Harris (Doc. 61-1) is, therefore, granted in part and denied in part

Judicial Notice regarding Sandifer case

Finally, Petitioner asks the court to take judicial notice of certain newspaper articles relating to Robert Sandifer, an 11-year-old gang member involved in a widely-publicized murder in late August 1994. After killing an innocent bystander in a gang fight, Sandifer was

himself executed by his own gang members. His body was discovered on September 1, 1994, the same day that Detective Cassidy questioned A.M. about the crime involved in this case. Detective Cassidy was aware of the Sandifer case and acknowledged he had read about it in the newspaper. He testified, however, that he did not know what date Sandifer's body was found and was not motivated to question A.M. as a result of that case. Certainly Detective Cassidy's knowledge concerning the Sandifer case is relevant to his state of mind at the time he interrogated A.M. The court cannot, of course, be certain of which of the proferred articles, if any, Detective Cassidy read, and therefore declines to take judicial notice of the contents of these articles. The court will nevertheless take judicial notice of the fact that the Sandifer murder captured a great deal of media attention at or near the time of A.M.'s interrogation. The court recognizes, further, Detective Cassidy's testimony that he was generally aware of the case and of its notoriety. Petitioner's request for judicial notice of the contents of each newspaper article is otherwise denied.

ENTER:

Dated: September 25, 2000

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REBECCA R. PALLMEYER
United States District Judge